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No. 79-518

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS (STUDS) TERKEL, PETITIONER

v.

WILLIAM WEBSTER, DIRECTOR,
FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 599 F. 2d 214. The opinion of the district court (Pet. App. 1c-15c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1979, and a petition for rehearing was denied on June 29, 1979 (Pet. App. 1b-2b). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a Freedom of Information Act suit in which the district court had sustained the FBI's exemption claims on the basis of a detailed index and

affidavits, the court of appeals ordered an insufficiently broad remand for in camera inspection of certain documents and additional justifications for deletions.

STATEMENT

1. On November 24, 1975, petitioner requested from the FBI, pursuant to the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), "a copy of all files in the FBI indexed or maintained under my name and all documents containing my name" (Pet. App. 1a, 2c). In January 1976, the FBI responded with a letter advising petitioner of its backlog of unprocessed FOIA requests and asking for his notarized signature, which was needed before processing of his request could begin (*id.* at 2c). In April 1976, petitioner sent his signature but also filed this suit in the United States District Court for the Northern District of Illinois to compel production of the requested documents (*ibid.*).

The FBI released 146 pages of documents to petitioner in December 1976. It noted, however, that, pursuant to specified FOIA exemptions, deletions had been made in some documents and other documents comprehended by the request had been withheld in their entirety. Additional documents were released in the next two months (Pet. App. 3c). The government thereupon moved for summary judgment, supporting its motion with three affidavits. Two of the affidavits concerned the security classifications, under Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Compilation), of certain documents withheld under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1) (Pet. App. 12c).[1] The third affidavit

[1]5 U.S.C. 552(b)(1)(A) exempts from mandatory disclosure documents that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order."

("the Wroblewski affidavit") explained the types of FBI documents that fell within petitioner's FOIA request and the theories used in applying the claimed exemptions to the materials withheld (Pet. App. 3c, 6c, 8c).[2] Attached to this affidavit was an itemized list providing a general description of each document withheld in whole or in part, describing as to each page on which a deletion was made the nature of the deleted material and the exemption or exemptions claimed, and cross-referencing each exemption to the paragraph in the affidavit explaining the theory on which the exemption was claimed (*id.* at 6a, 3c-4c).

The district court granted the government's motion, finding that the FBI's reliance on Exemptions 1, 2, and 7(C), (D) and (E) of the FOIA, 5 U.S.C. 552(b)(1), (b)(2), (b)(7)(C), (b)(7)(D) and (b)(7)(E), and on Exemption (k)(5) of the Privacy Act of 1974, 5 U.S.C. 552a(k)(5), was justified by the detailed affidavits and index (Pet. App. 8c-15c).

2. The court of appeals affirmed in part, but remanded the case for the limited purpose of requiring the government (i) to justify, in three instances, the withholding of an entire page of a document to protect the identity of confidential informants and investigating agents and (ii) in the case of "numerous" documents, to explain why disclosing " 'symbol numbers' " of informants might reveal their identities (Pet. App. 7a). The court observed that the three pages withheld to protect

[2]The affidavit explained that the FBI had maintained two files on petitioner—one compiled in connection with his application, in 1934, for employment with the FBI, and the other compiled in connection with an investigation of his " 'activities in support of racial equality and possible Communist causes' "from 1945 to 1961" (Pet. App. 2a n.1).

identities of agents and informants would be "appropriately subject to an in camera review by the district court" (Pet. App. 7a). As to the remainder of the withheld material, the court of appeals agreed with the district court that the detailed index and affidavits adequately established the exempt status of the material (*id.* at 5a-7a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the ruling of any other court. Because the decision turns on a determination whether identifications of particular pages of excised documents or portions thereof provide an adequate basis for determining the exempt status of the deleted material, the case does not present any legal issue of sufficient significance to warrant review by this Court.

1. Petitioner contends (Pet. 8-12) that the decision of the court of appeals conflicts with *Ray* v. *Turner*, 587 F. 2d 1187 (D.C. Cir. 1978), with respect to the treatment of index entries that list more than one exemption for a single document. This contention is meritless.

As petitioner notes (Pet. 9-10), the *Ray* court deemed inadequate the written justifications for exemptions claimed by the CIA for certain documents because the justifications "lump[ed] the exemptions together," "fail[ed] to identify whether different exemptions [were] claimed as to different parts of each document," and, in some cases, failed "to address specifically whether the disclosure of substantive information may [have been] possible without the disclosure of [an intelligence] source" (587 F. 2d at 1196). But the deletion descriptions in the document index filed in the present case are far

more complete than those described in *Ray*. As the district court noted (Pet. App. 3c-4c):

> [The Wroblewski affidavit] consists of a lengthy, detailed description of all documents released, the nature of portions excised, the statutory source of the exemptions claimed, the reasons the exemptions were claimed, and the standards used in applying the exemptions to individual document portions. In addition, the affidavit contains a document-by-document index in which each document is described, deleted portions are outlined as to quantity and general character, the statutory exemption claimed for each portion is notated, and the paragraph in the body of the affidavit which explains the application of the particular exemption to particular kinds of materials is cross-referenced. Further, attached to the affidavit is a copy of each document released to plaintiff, on which the deleted portions are clearly visible and from which it can readily be ascertained whether or not such portions are likely to contain the kinds of information the FBI claims they do.

The format used for the Wroblewski affidavit and index supplies substantially more information about particular exemption claims than was provided in *Ray*. In the case of multiple exemption claims, the description of deleted material in the document index, together with the detailed explanations in the Wroblewski affidavit of the types of material the FBI considers covered by a given exemption, clearly relate each deletion or withholding to a separate exemption claim.[3]

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[3]Take, for example, Document 5 on the list of documents from the file relating to petitioner's support of certain "causes" (Exh. A to Defendants' Motion for Summary Judgment, at page 30). Three

Hence, the court of appeals was not necessarily applying a standard different from that employed in *Ray*, but was merely considering index entries that more clearly suggested the nature of particular deletions. The court below was fully sensitive to the problem of possibly overbroad deletions, as demonstrated by the terms of its remand (see pages 3-4, *supra*). In sum, petitioner is simply asking this Court to review the essentially factual determination of both lower courts that the deleted or withheld documents specified in the FBI index entries "are likely to contain the kinds of information the FBI claims they do" (Pet. App. 4c).

2. Petitioner also contends (Pet. 16-21) that the district court erred in upholding the FBI's exemption claims without itself inspecting the withheld material in camera. As the court of appeals correctly noted (Pet. App. 5a), however, although the FOIA provides for in camera inspection in 5 U.S.C. 552(a)(4)(B), the legislative history of that provision clearly explains that the determination whether to undertake an inspection in any

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separate exemptions are claimed for material deleted on page 1 of the document, and each exemption is expressly tied to a description of the material deleted pursuant to that exemption. With respect to page 3 of that document, two exemptions—(b)(2), relating to internal personnel and administrative matters, and (b)(7)(D), relating to information that would disclose the identity of a confidential source—are listed as applicable to the "[s]ymbol numbers of 5 confidential sources." The cross-reference to the corresponding sections of the Wroblewski's affidavit (paras. 14(B) and 14(D)(1)) makes clear that (b)(2) was claimed because the symbol numbers are considered indicators of "FBI administrative practices regarding the handling of informants" and (b)(7)(D) was claimed because the numbers are identifications of confidential sources. A third exemption claimed for material deleted on page 3 also under (b)(7)(D)—is set forth on a separate line, and the information to which it applies is described in a separate entry.

given case is confided to the sound discretion of the district court. See H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 9 (1974); *Weissman* v. *CIA*, 565 F. 2d 692, 696 (D.C. Cir. 1977). Even under the District of Columbia Circuit's approach, the district court would have abused its discretion in refusing to make an in camera inspection only if the FBI had failed to provide descriptions of the deleted information sufficient to establish that it properly fell into the category of the exemption indicated, or if there was a "record * * * showing of bad faith." *Ray* v. *Turner*, *supra*, 587 F. 2d at 1195. Accord, *Weissman* v. *CIA*, *supra*, 565 F. 2d at 697. As noted above, the FBI provided detailed descriptions of all deleted materials, and the court of appeals expressly stated (Pet. App. 7a) that there was nothing in the record to suggest a lack of good faith.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The court of appeals also observed that "the FBI has dealt with the instant FOIA request in a responsible and conscientious manner" (Pet. App. 5a). The court did specify in connection with its remand order that an in camera inspection might be appropriate in regard to a few documents to determine whether certain deletions were broader than necessary to protect the intersts implicated in the particular exemption claimed.

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